

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matters of	)	
	)	
Policies and Rules	)	
Governing Retirement of Copper Loops	)	
By Incumbent Local Exchange Carriers	)	
	)	RM-11358
Petition of XO Communications, LLC,	)	
Covad Communications Group, Inc., NuVox	)	
Communications and Eschelon Telecom, Inc.	)	
For a Rulemaking to Amend Certain Part 51	)	
Rules Applicable to Incumbent LEC	)	
Retirements of Copper Loops and Copper	)	
Subloops	)	
	)	
AT&T Petition to Launch a Proceeding	)	
Concerning the TDM-to-IP Transition	)	
	)	GN Docket No. 12-353
Petition of the National Telecommunications	)	
Cooperative Association for a Rulemaking	)	
to Promote and Sustain the Ongoing TDM-to-IP	)	
Evolution	)	
	)	

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**COMMENTS OF THE MIDWEST ASSOCIATION OF  
COMPETITIVE COMMUNICATIONS, INC.**

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**COMMENTS OF THE MIDWEST ASSOCIATION OF  
COMPETITIVE COMMUNICATIONS, INC.**

Pursuant to the Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) on February 4, 2013,<sup>1</sup> the Midwest Association of Competitive Communications, Inc. (“MACC”) files the following comments in support of TelePacific *et al.*’s January 25, 2013 letter<sup>2</sup> requesting that the Commission “refresh the record” and revise its

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission’s Copper Retirement Rules*, Public Notice, WC Docket No. 12-353 & RM 11-358, DA 13-147 (WCB rel. Feb. 4, 2013).

<sup>2</sup> Letter of U.S. TelePacific Corp. *et al.* Requesting Commission to Refresh Record and Take Expedited Action to Update Copper Retirement Rules, WC Docket Nos. 10-188, 12-353; GN Docket Nos. 09-51, 13-5; RM-11358 (filed Jan. 25, 2013) (“TelePacific Letter”).

copper retirement rules.

## **I. INTRODUCTION AND SUMMARY**

MACC is an association of 12 CLECs formed to foster competition in the communications industry in the Midwest as well as portions of the Southwest by participating on behalf of its membership in the regulatory and legislative process. MACC also creates public forums to educate officials and the public about the economic and social benefits of competition. MACC members supporting this filing include Birch Communications; dishNET Wireline, L.L.C.; EarthLink, Inc.; First Communications, LLC; Level 3 Communications, LLC (“Level 3”); MegaPath Corporation; Socket Telecom LLC; TDS Metrocom LLC (“TDS Metrocom”); and XO Communications, LLC (“MACC Members”).<sup>3</sup> While MACC Members offer different competitive services, a united belief among them is that a vibrant, open market encourages companies of all sizes—big and small—to offer better service, provide the lowest possible prices, and roll-out innovative products. To maintain a competitive policy that will drive innovation as we transition networks to new technologies, the MACC members encourage the FCC:

- To affirm that the Telecommunications Act of 1996 requires interconnection and access to last-mile facilities on a technology neutral and non-discriminatory basis;
- To reexamine FCC rules to ensure they are not written on a technology specific basis that can be read to limit access to last-mile facilities on a technology specific basis;
- To provide clarity to rules to ensure access to competitive offerings are not constrained based on the underlying technology by ensuring (1) interconnection rights for packetized voice, and (2) access to ILEC last-mile facilities (including both packetized loops and copper) on a technology-neutral basis.

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<sup>3</sup> While Level 3 and TDS Metrocom are MACC Members supporting this filing, they are also sponsors of the TelePacific Letter.

In furtherance of these policy principles, MACC supports the goals of the TelePacific Letter. The Commission should examine a number of rules that impact competition, including its copper retirement rules to strengthen them in a way to promote new technologies that provide affordable broadband, whether it is over copper or fiber. While there is no question that the deployment of robust broadband services provisioned via Ethernet can be provisioned over fiber, the nation's copper loop network infrastructure is being used today as a means to accomplish affordable broadband.

Ethernet over Copper ("EoC") is one technological means of delivering affordable broadband to businesses today. "[I]f copper facilities [being used to provide broadband today] were to be broadly retired – with no functionally and similarly priced alternative wholesale product available – the cost of providing broadband services to these small and medium size business customers could increase dramatically ([b]y 10 to 40 times)."<sup>4</sup> Small and medium size businesses that cannot absorb such price increases may therefore lose access to the high-speed broadband services they enjoy today, decreasing, rather than increasing, the nation's broadband adoption rate. Therefore, the Commission should not allow the nation's copper loop infrastructure, which is a tremendous national resource, to be retired prematurely.

While the Commission recognizes the importance of providing regulatory certainty to promote investment and innovation, under the copper retirement regime, Bell Operating Companies ("BOCs") believe they can "kill the copper" and have indicated that they will do just that. Given the Commission's authority to preserve and promote affordable broadband over copper,

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<sup>4</sup> See Letter from Karen Reidy, counsel for COMPTel, to Marlene H. Dortch, Secretary, FCC, RM-11358, GN Docket No. 12-353 *et al.*, at 1-2 (filed Feb. 25, 2013) ("COMPTel 2/25/13 Letter"); see also *id.* at MegaPath presentation, slide 5 & 7 and Broadview presentation, slide 5.

the Commission should refresh the record and update its copper retirement rules and if an ILEC retires its copper facilities, the Commission should require that ILECs provide, at a minimum, the functional and price equivalent wholesale services on fiber facilities if such obligations are not otherwise imposed prior to the retirement of any copper facilities.<sup>5</sup>

Back in 2007, two groups of competitive carriers filed separate petitions that initiated RM-11358 and sought strengthened copper retirement rules to prevent premature retirement.<sup>6</sup> However, after five years and despite the Broadband Plan's recommendation that copper retirement issues need to be addressed, the Commission has not acted on these original Petitions or the Broadband Plan's recommendation. Therefore, MACC urges the Commission to act now by addressing copper retirement issues as requested in the TelePacific Letter.

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<sup>5</sup> COMPTel 2/25/13 Letter at 3. As stated in the *Competitive Coalition Letter*, the Commission should “ensure a technology-neutral approach to unbundling by applying the established impairment standard to packet-mode unbundled loops. Where competitors are impaired in the absence of packet-mode loops, the FCC should enforce reasonable unbundling policies....Commission [should] maintain a technology neutral approach to special access by applying appropriate price and non-price policies in product and geographic markets in which incumbent LECs have market power over packet-mode special access services....[and] adopt a technology neutral approach to copper loop retirement so as to eliminate uneconomic and anti-competitive regulatory incentives for incumbent LECs to retire copper before the end of its useful life, especially in cases where no wholesale packet-mode last-mile facility is available on reasonable rates, terms, and conditions.” See Letter of Hon. Chip Pickering et al, to Marlene Dortch, WC Docket No. 10-90 et al, filed Oct. 31, 2012 (“*Competitive Coalition Letter*”). See Letter of Hon. Chip Pickering et al., to Marlene Dortch, Secretary, FCC, RM-11358 et al., at 5-6 (filed Oct. 31, 2012) (“*Competitive Coalition Letter*”).

<sup>6</sup> See BridgeCom International, Inc. et al, Petition for Rulemaking and Clarification, RM-11358, at 12 (filed Jan. 18, 2007); XO Communications, LLC et al, Petition for Rulemaking, RM-11458 (filed Jan. 18, 2007).

## **II. THE EXISTING COPPER RETIREMENT RULES NEED TO BE STRENGTHENED TO PROMOTE AFFORDABLE BROADBAND OVER COPPER**

### **A. Protecting Copper from Premature Retirement will Promote Affordable Broadband**

The Commission has held “access to broadband has become essential”<sup>7</sup> and the goal of making broadband available to all Americans is paramount.<sup>8</sup> Yet despite the Commission actions to enhance competition and reduce barriers to investment as Section 706 of the Telecommunications Act of 1996 (“1996 Act”) requires,<sup>9</sup> the Commission has concluded three years in a row that broadband is not being deployed to all Americans on a reasonable and timely basis.<sup>10</sup> Consequently, pursuant to Section 706(b),<sup>11</sup> the Commission must “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure invest-

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<sup>7</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket No. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, ¶ 120 (rel. Aug. 21, 2012) (“2012 Broadband Report”).

<sup>8</sup> See, e.g., 2012 Broadband Report ¶¶ 10-14; *Connect America Fund et al.*, GN Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 1-3 (2011) (subsequent history omitted).

<sup>9</sup> See, e.g., *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 2 (2011).

<sup>10</sup> See 2012 Broadband Report, ¶ 1; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Seventh Broadband Progress Report*, GN Docket No. 10-159, Seventh Broadband Progress Report, 26 FCC Rcd 8008, ¶ 1 (2011); See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket 10-159, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, ¶ 2 (2010).

<sup>11</sup> 47 U.S.C. § 1302(b).

ment and by promoting competition in the telecommunications market.”<sup>12</sup> The Commission’s principle objective is to achieve lower prices, higher quality, and the rapid deployment of broadband services for all Americans.

**B. The Commission’s Copper Retirement Rules Thwart Robust Investment in Copper and Set the Stage for Increased Broadband Prices**

Despite copper’s enormous promise with EoC, the copper retirement rules do not protect this tremendous national resource because the rules provide no means for any substantive challenge or review of an ILEC’s retirement of copper facilities in overbuild situations. Moreover, the minimal procedural rules that do exist only provide for limited objections by a provider interconnecting with the ILEC’s network and, then only provide for some additional time for the competitor to get off the facilities.<sup>13</sup> Consequently, the rules do not protect copper facilities CLECs may want to use in the future and provide nearly no protection for customers receiving broadband services provided by CLECs over copper facilities at the time of the proposed retirement.<sup>14</sup>

While the Commission recognizes the importance of providing regulatory certainty to

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<sup>12</sup> *Id.*

<sup>13</sup> See 46 C.F.R. § 51.333(c) & (f). Moreover, the Commission excluded the copper feeder plant from the limited protection it did provide to copper loops and subloops. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, n.829 (2003) (“*Triennial Review Order*”), corrected by Errata, 18 FCC Rcd 19020 (2003) (subsequent history omitted). If the copper feeder plant is unavailable for unbundled access, the practical difficulty of obtaining access to the remaining portion of the loop forecloses competitive access to the customer. See *BridgeCom International, Inc. et al*, Petition for Rulemaking and Clarification, RM-11358, at 12 (filed Jan. 18, 2007). See also Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 and RM-11358, at 3-4 (filed Dec. 7, 2009) (discussing same).

<sup>14</sup> See TelePacific Letter at 11-13; COMPTTEL 2/25/13 Letter at 1.



promote investment and innovation, under the copper retirement regime, BOCs believe they can ““kill the copper”” and plan to do that.<sup>15</sup> The copper retirement rules do not prevent that from happening and therefore, the rules provide no regulatory certainty to CLECs that the last mile copper loops on which they rely to provide broadband service to existing and potential customers will be available. The absence of certainty hampers investment in the network electronics needed to provide EoC. As the TelePacific Letter explains, “[w]ithout some assurance that the loops they currently use, and would use in the future, will continue to be available, CLECs and their investors may not be able to justify capital expenditures that must be recovered over multiple years.”<sup>16</sup>

Copper retirement harms innovation of products and services over such copper infrastructure, reduces competitive alternatives, and increases prices to consumers.<sup>17</sup> Broadview’s and MegaPath’s recent presentations to the Commission demonstrate that a substantial number of small and medium size end-user businesses will be impacted by the retirement of copper loops used to provide EoC.<sup>18</sup> Indeed, the “decommissioning of copper facilities could strand massive dollar investments in competitive products and services, as well as curtail future innovation of products and services over existing copper infrastructure.”<sup>19</sup> In addition, innovation of products and services over existing copper facilities could disappear.<sup>20</sup> Moreover, “if copper facilities were to be broadly retired – with no functionally and similarly priced alternative wholesale product available – the cost of providing broadband services to these small and medium size

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<sup>15</sup> TelePacific Letter at 11 (quoting Transcript, Verizon at Guggenheim Securities Symposium, at p. 8 (June 21, 2012)).

<sup>16</sup> TelePacific Letter at 12-13.

<sup>17</sup> See COMPTel 2/25/13 Letter at 1-2.

<sup>18</sup> See *id.* at 1-2, MegaPath presentation, slide 5 & 7, and Broadview presentation, slide 5.

<sup>19</sup> COMPTel 2/25/13 Letter at 1.

<sup>20</sup> See *id.*

business customers could increase dramatically ([by 10 to 40 times]).”<sup>21</sup>

At bottom, under the Commission’s copper retirement rules, ILECs can preclude the deployment of affordable, copper-based broadband services in overbuild situations by retiring the copper feeder or loop (in whole or in part), even where the copper facilities remain and could be utilized for the provision of competitive broadband services. Absent Commission action, BOCs have made it clear that copper loops or feeder will be retired at an accelerated pace.<sup>22</sup> Given the large number of Americans that do not have access to fixed broadband meeting today’s speed benchmark,<sup>23</sup> the Commission should not permit this loss of alternative high speed broadband.

Instead, the Commission should modify its copper retirement rules as the TelePacific Letter requests to ensure that “(1) customers currently receiving broadband over copper loops do not lose their affordable broadband service and (2) the rules promote the regulatory certainty necessary for further investments in development of new technologies for affordable broadband over copper.”<sup>24</sup> By preserving the availability of copper loops, the Commission can protect this national resource and afford an alternative means of access to customers and, in addition, provide a platform for more innovation. Because ILECs have the ability to embark on or threaten widespread retirements at any time, the need for revised retirement rules is crucial. If ILEC copper facilities are allowed to be retired, however, to ensure broadband remains affordable, the Commission should require that the ILEC provide, at a minimum, the functional and price

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<sup>21</sup> *Id.* at 1-2; *see also id.* at MegaPath presentation, slide 5 & 7 and Broadview presentation, slide 5.

<sup>22</sup> *See* TelePacific Letter at 11.

<sup>23</sup> *See id.* at 4.

<sup>24</sup> *See id.*

equivalent wholesale services on fiber facilities if such obligations are not otherwise imposed prior to the retirement of any copper facilities.<sup>25</sup>

### **III. THE COMMISSION HAS THE AUTHORITY TO TAKE THE NECESSARY ACTIONS TO PREVENT PREMATURE RETIREMENT OF COPPER LOOPS AND PROMOTE AFFORDABLE BROADBAND OVER SUCH FACILITIES**

The Commission has the statutory authority to modify its copper retirement rules as requested in the TelePacific Letter.<sup>26</sup> Adopting such rules implements statutory mandates under Sections 251(c)(3), 271, and 706 of the Act. These sections provide the Commission both “authority” and “discretion” “to settle on the best regulatory or deregulatory approach to broadband,”<sup>27</sup> which includes adopting the proposed rules. In addition, pursuant to its plenary authority under § 201, the Commission has the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”<sup>28</sup> Moreover, the Commission’s Broadband Plan supports the adoption of these rules.<sup>29</sup>

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<sup>25</sup> See *supra* note 5.

<sup>26</sup> See TelePacific Letter at 15-20.

<sup>27</sup> *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906–07 (D.C. Cir. 2009).

<sup>28</sup> 47 U.S.C. § 201(b); see also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (the Commission “has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252, added by the Telecommunications Act of 1996.”) (quoting § 201(b)).

<sup>29</sup> See TelePacific Letter at 19-20.

#### **IV. CONCLUSION**

For the forgoing reasons, the Commission should modify its copper retirement rules as requested in the TelePacific Letter and herein.

Respectfully submitted,

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COMPETITIVE COMMUNICATIONS,  
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